Does Your Company's Smartphone Policy Create Liability under the Fair Labor Standards Act?

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Thanks to the increasing prevalence of smartphones, mobile devices, and wireless Internet connectivity, employees have become accessible to clients, employers, and coworkers far beyond traditional office hours. In today's digital age, company-issued smartphones have become the norm for many employees, and there is a mounting expectation among employers that their employees will be available to respond to work e-mails during evenings, weekends, and their days off.

Although an increase in employee availability may enhance productivity and lead to greater responsiveness and collaboration among those employees, the proliferation of employer-issued mobile devices has also resulted in a rise in recent years in employee overtime claims under the Fair Labor Standards Act (FLSA). With greater numbers of employees seeking compensation for off-the-clock work performed remotely, it is more critical than ever for employers to understand exactly when, and for what type of work, they are obligated to pay overtime compensation to employees.

WHEN IS AN EMPLOYEE COVERED BY THE FLSA?

The Fair Labor Standards Act sets out compensation requirements for all "covered employees"—that is, for all employees who are not exempt from coverage under the FLSA. Under the FLSA, employers must pay nonexempt employees at least the federal minimum wage for all hours worked, as well as overtime pay at a rate of one-and-a-half times the regular rate of pay for every

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hour worked in excess of 40 hours per work week.[1] In addition to recovery of unpaid back wages, employees who prevail in litigation for violations of the FLSA can also recover interest, liquidated damages, attorneys' fees, and other costs.

To determine whether an employee who checks work-related e-mail on a mobile device outside of office hours is qualified for overtime compensation, an employer first must consider whether the employee is exempt under the FLSA. An employee's exempt or nonexempt status under the FLSA depends on a number of factors, including an employee's salary and the responsibilities required by his or her position. Although numerous exemptions are contained in the FLSA, the most common exemptions are the "white-collar" exemptions for employees who work in an executive, administrative, or professional capacity. In order to qualify for the executive, administrative, or professional exemptions, an employee must earn an annual salary of at least $23,660 and perform certain duties as set forth in regulations established by the US Department of Labor (DOL). An employee who satisfies one of these exemptions will not be entitled to overtime compensation from his or her employer under the FLSA, regardless of the number of hours worked.

Different tests apply to each of the white-collar exemptions. An employee will qualify for the executive exemption if (1) the employee's primary duty is to manage an enterprise or an enterprise's subdivision; (2) he or she regularly supervises or directs the work of two or more other employees; and (3) he or she has the authority to hire or fire employees, or to substantially influence the decision to take those actions.

The requirements for the professional exemption are met if an employee's primary duty requires either (1) advanced knowledge acquired by the prolonged course of specialized instruction or (2) invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

An employee will satisfy the administrative exemption if his or her primary duty involves (1) office or nonmanual work that is directly related to the management or general business operation of the employer and (2) the exercise of discretion and independent judgment with respect to matters of significance.

WHEN ARE AN EMPLOYEE'S ACTIONS CONSIDERED WORK UNDER THE FLSA?

If an employee does not fall within any of the white-collar FLSA exemptions, an employer should next consider whether the employee's off-the-clock use of work e-mail actually qualifies as *work* for the purposes of the FLSA. There is no specific definition of *work* in the FLSA, but the term has been defined by the Supreme Court as "physical or mental exertion (whether

burdensome or not) controlled or required by the employer and pursued necessarily for the benefit of the employer and his business."[2] The Supreme Court's definition of *work* includes work performed outside of an employee's prescribed work hours, but only where the off-the-clock work is an "integral and indispensable part" of the employee's activities.[3]

The meaning of *work* under the FLSA is also limited by the de minimis doctrine, which was established by the Supreme Court in *Anderson v. Mt. Clemens Potter Co.*[4] The de minimis doctrine holds that when a nonexempt employee performs only a few minutes of work during off-the-clock hours, that time is disregarded for purposes of compensation; only when an employee is required to give up a substantial amount of time and effort does the time become compensable. In order to determine whether an amount of work performed is de minimis or substantial, courts will consider three factors: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work."[5] Although a single instance of off-the-clock work might be considered de minimis, an employee seeking overtime compensation may demonstrate a substantial amount of work by aggregating multiple instances of work done before or after regular working hours. Employers should be cautious when considering whether to classify certain amounts of off-the-clock employee work as automatically de minimis in their employment policies; given the range of opinions that courts have expressed on the subject, employers must not assume that establishing bright-line rules in their internal procedures will protect them from liability.

Employers should note that work performed by an employee outside of prescribed work hours can qualify for overtime compensation under the FLSA even if the employer did not request or demand that the employee perform the work. The DOL and a majority of courts have taken the position that so long as an employer knew, or had the opportunity through reasonable diligence to find out, that the employee was working overtime, that work can be compensable under the FLSA.

Employers should also be aware that they cannot determine the potential liability arising from an employee's claims for overtime compensation solely by conducting an FLSA analysis. In addition to federal law, a number of states have different, and more stringent, requirements with respect to an employee's right to overtime compensation. An employee who is not entitled to overtime pay under the FLSA may still be entitled to overtime compensation under relevant state employment laws. Any state law that provides more robust protections to employees than do federal laws will trump applicable federal legislation. Employers should, therefore, always take state laws into account when developing internal employment policies and evaluating employee claims for overtime compensation.

WHAT LESSONS CAN EMPLOYERS LEARN FROM *RUTTI V. LOJACK CORP. INC.*?

While a growing number of lawsuits on the issue of overtime compensation for after-hours work performed on a mobile device have been brought in recent years, one case that illustrates the issue well is *Rutti v. Lojack Corp. Inc.*, a case decided by the Ninth Circuit in 2010.[6] In *Rutti*, a group of car-alarm technicians brought an overtime claim against their company for work-related activities performed before and after their regular shifts. The technicians were required to log on to portable electronic devices provided by the company before each day's shift in order to download the day's assignments. During their shifts, the technicians would record information about their assignments onto their portable devices, and after their shifts ended, the technicians were required to transmit that data back to the company. The technicians were not always able to perform this transmission immediately upon returning home for the day because of delays caused by the company's computer system, and they sometimes had to transmit information to the company multiple times after work. The technicians argued that the company should compensate them for the time they spent on their portable devices before and after work.

Although the employer won at the trial-court level, the appellate court reversed, finding that a trial was necessary on the issue of whether the technicians were qualified to receive overtime compensation for their after-hours work. The appellate court pointed out that there is no bright-line rule that work lasting 10 or 15 minutes should automatically be considered de minimis; rather, it employed the three-pronged test for determining whether work is de minimis (noted above) and found that two of the prongs—the aggregate amount of compensable time involved and the regularity of the additional work—weighed in favor of the company's technicians.

In light of the Ninth Circuit's opinion in *Rutti*, employers should not assume that the de minimis doctrine will provide them with a defense against overtime claims, as even small amounts of work performed by employees while off the clock could trigger a right to compensation. Although courts have consistently found that a minute or two of work done outside of usual work hours is de minimis, courts tend to interpret the doctrine based on the facts of each case. Some courts, like the Ninth Circuit Court of Appeals, refuse to establish a bright-line rule that would automatically classify even five minutes of work as de minimis. Small amounts of work, even 10 or 15 minutes a day, could be viewed as substantial to warrant overtime compensation, especially when taken in the aggregate over an average work week. Employers would be wise to invoke the de minimis

doctrine carefully, recognizing the fact that the doctrine may not be the reliable defense that many assume it to be.

WHAT STEPS CAN EMPLOYERS TAKE TO AVOID LIABILITY UNDER THE FLSA?

Of course, rather than learn the best ways to defend themselves against overtime claims, most employers would prefer to stay out of court altogether. By following a few practical guidelines, employers can limit the number of overtime claims brought against them by employees demanding compensation for off-the-clock work done on mobile devices.

At the outset, employers should identify their objectives in giving employees mobile devices that permit remote e-mail access. Even if an employer does not wish to create the impression that its employees must check their work e-mail outside of work hours, employers should understand that distributing a mobile device with remote e-mail capability may send such a message to the employee receiving the device. Employers should, therefore, consider providing smartphones and similar devices only to essential personnel and employees whom the employer needs to access outside of regular work hours. If an employer is not prepared to compensate nonexempt employees for off-the-clock work, then the employer should not provide those employees with devices that provide remote access to work e-mail.

Even if employers do not provide nonexempt employees with mobile devices, employees may still be able to perform work activities off the clock using personal e-mail accounts or cellular phones. Depending on the circumstances, such work could trigger overtime requirements under the FLSA. An employer can take additional precautions against overtime claims by putting in place workplace policies that prohibit nonexempt employees from working remotely outside of regular work hours altogether. In addition, an employer may be well advised to require that an employee who is going to work remotely obtains the prior approval of his or her supervisor. If an employee brings an overtime claim for off-the-clock work, these policies would support a defense that the employer did not know, and should not have known, that the employee was using personal phone or e-mail accounts to work outside of office hours.

An employer who does permit nonexempt employees to work remotely outside of prescribed work hours can limit exposure to overtime claims by putting procedures in place that limit the type and amount of work an employee can do while off the clock. For example, an employer may require employees to get prior approval from a supervisor or manager before engaging in any remote work. An employer may also require employees to

record all work done outside of their usual work hours, certify that they have accurately recorded and reported all hours worked, and submit these records regularly, on a daily or weekly basis. With such a policy in place, an employer should always be aware of how much overtime compensation may be owed to employees, and—if an overtime claim were ever filed—the employer would not be forced to rely on employee records of overtime work performed.

Finally, no workplace policy regarding overtime compensation for off-the-clock work will protect an employer adequately if the employer improperly classifies an employee as exempt from the FLSA when the employee is, in fact, nonexempt. Employers who permit only exempt employees to work after hours or use employer-issued mobile devices must be careful when determining whether an employee is exempt or nonexempt. Employers may find regular wage-and-hour audits helpful in ensuring that employees are properly classified under the FLSA.

Regardless of the policies they establish to address off-the-clock work, employers should make sure that all policies and procedures are memorialized in writing and formally acknowledged by employees. Additionally, no policy, however rigorous, will be effective if employees are not aware of it, or do not remember its particulars. Regular training sessions to update and remind both nonexempt employees and their supervisors of office policies regarding overtime work are key to maintaining a well-informed workforce and avoiding claims by employees.

NOTES

1. The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201, et seq.
2. Tenn. Coal, Iron R.R. v. Muscoda Local No. 123, 321 U.S. 501 (1944).
3. Steiner v. Mitchell, 350 U.S. 247 (1956).
4. Anderson v. Mt. Clemens Potter Co., 328 U.S. 680 (1946).
5. Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984).
6. Rutti v. Lojack Corp. Inc., 596 F.3d 1046 (9th Cir. 2010).

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